TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1922

No. 653. 229

OMNIA COMMERCIAL COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 19, 1921.

(28,608)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1921.

1 In the Court of Claims of the United States.

No. 197-A.

OMNIA COMMERCIAL COMPANY, INCORPORATED, Plaintiff,

vs.

THE UNITED STATES, Defendants.

I. *Petition.*

(Filed June 15, 1921.)

To the Honorable the Chief Justice and Justices of the Court of Claims:

Comes now the plaintiff in the above entitled cause and for its cause of action alleges as follows:

The plaintiff is a corporation created and doing business under the laws of the State of New York, with its principal place of business in the City of New York in said State. The plaintiff's business has been the purchase, manufacture and sale of steel suitable for the uses to which steel and steel products may be put, but particularly the purchase and sale of steel and steel products suitable for ship and tank construction. The plaintiff corporation was one of two corporations created and employed as vehicles of convenience for the more readily carrying out of the purposes and transactions of the five associates hereinafter named.

2 The sole stockholders, directors and officers of the plaintiff corporation are Robert P. Tucker, Charles Dannen, Charles B. Eddy, Jacob Meurer and Ralph R. Watney, all loyal citizens of the United States and yielding allegiance to their government. These individuals have been associated together from the outset of the enterprise which gave rise to the rights subsequently transferred to this plaintiff and which rights are the basis of the cause of action herein stated.

These five associated individuals last named, who subsequently became the sole stockholders of the petitioning corporations, began in the latter part of the year 1915, an investigation of the practicability of erecting and operating a plant for the manufacture of steel plate. As the result of an exhaustive and expensive study, they finally decided to erect such a plant at Chattanooga, Tennessee.

In furtherance of this decision, the said associates purchased the most modern 34-inch blooming mill which money could buy. This they arranged to convert into a 108-inch plate mill. In addition they secured: the electrical equipment for the driving of such a mill, including a 6,000 horsepower reversible electric motor, etc.; the structural steel for the erection of the intended plant; contracts for erection of the plant, contracts for material for furnaces, contracts

for cranes, contracts for power and many other minor contracts; and finally, one hundred (100) acres of land with valuable water and rail rights upon which land they spent great sums in the installation of drainage, erecting wharf buildings, grading, road making, etc. Also the said associates had selected a skeleton organization of operating foremen and superintendents and so great progress had been made that an equal stage of development with deliveries of similar machinery could not have been achieved in two full years.

3 Early in 1917, after all the said machinery had been assembled at Chattanooga and construction work was in progress, the five associates aforesaid, upon considering the fact that there was a threatened shortage of labor and material, which would probably delay the completion of their plant, and upon considering the fact that the price of finished steel plate had attained an unprecedented figure, concluded to sell said machinery and equipment to an established and going concern and to accept the purchase money therefor in steel plate for quick delivery, knowing that the plate could be disposed of on the then market readily and at almost any price which might be demanded for it. Accordingly, they entered into negotiations with the offers of the Allegheny Steel Company, a corporation with its principal offices at Pittsburgh, Pennsylvania. These negotiations extended over a period of some months, and finally resulted in the sale to the said officers, acting on behalf of the said Allegheny Steel Company, of all said machinery and equipment at a price which was then and there agreed between the said associates and the said officers of the said Allegheny Steel Company to be approximately Three Million, Seven Hundred and Five Thousand Dollars ($3,705,000), to be paid as follows: Five Hundred Thousand Dollars ($500,000) in cash and the remainder in Fifty-eight Thousand (58,000) tons of finished steel plate to be delivered to the associates, or their assigns, in equal monthly installments during the year 1918, at a price of Three Million, Two Hundred and Five Thousand Dollars ($3,205,000) below the minimum market value of said plate.

In other words, it was agreed that in consideration of the transfer to the said officers of the said Allegheny Steel Company, acting as agents for that company, by the said associates of their machinery, equipment and other properties, the said Allegheny Steel Company

4 should be obligated to deliver to the said associates, or their assigns, the entire expected steel plate production of the said Allegheny Steel Company in the year 1918, and the said Allegheny Steel Company should be obligated to credit the said associates with Three Million, Two Hundred and Five Thousand Dollars ($3,205,000) on the purchase price of the steel plate expected to be produced by that company in the year 1918.

Sometime after the making of the agreement last described, contracts were made in writing between the parties with the object of achieving the purposes of the said agreement. Copies of these contracts are hereto attached as Exhibits I to III, inclusive, and Exhibits IV and V and are made a part hereof as completely as tho set out in full at this point.

After the making of the said agreement hereinbefore first described between the said associates and the said officers and agents of the Allegheny Steel Company, and on the nineteenth day of May, 1917, the said five associates transferred for a proper and lawful consideration to the plaintiff corporation, of which the said associates, were, and are, exclusively the stockholders, directors and officers, all the right, title and interest which the said associates as individuals had in and to the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, i. e., the right to purchase from the said Allegheny Steel Company, Eighteen Thousand (18,000) tons of steel ship plate at Six and One quarter cents (6¼c.) per pound for delivery in equal monthly installments during the year 1918. Said transfer and assignment to the plaintiff was made with the full knowledge, consent and approval of the said officers and agents of the said Allegheny Steel Company.

The plaintiff corporation having received by assignment from the said associates all their right, title and interest in the contract set out in Exhibits I to III, inclusive, hereto attached and made
5 a part hereof, it was determined between the plaintiff and the said Allegheny Steel Company that this obligation should be reduced to a direct obligation between the plaintiff and said company. Accordingly, the plaintiff then entered into a direct written contract with the said Allegheny Steel Company for the purchase from the latter of Eighteen Thousand (18,000) tons of steel ship plate, said agreement taking the place of, and being substituted for, the rights of the parties which had arisen under the contract set out in Exhibit I to II inclusive, hereto attached and made a part hereof. This direct agreement between the plaintiff and the said Allegheny Steel Company was committed to writing and executed by the parties hereto on the twenty third day of August, 1917. A true copy of this contract is hereto attached as Exhibit VI and made a part hereof as completely as tho set out in full at this point.

Pursuant to its obligation under the contract, set out in Exhibits I, II and III, hereto attached and made a part hereof, transferred to it by the associates as hereinbefore described and under its direct obligation as set out in Exhibit VI, hereto attached and made a part hereof, to provide letters of credit in favor of the said Allegheny Steel Company, for at least One Million Dollars ($1,000,000), the plaintiff actually did provide letters of credit, in excess of Two Million, Three Hundred and Seventy Thousand Dollars ($2,370,000) issued by the Empire Trust Company of New York City. As a result of the posting by the plaintiff of these letters of credit, the said Allegheny Steel Company was enabled to procure, and did purchase, the raw materials necessary to perform its said contract with the plaintiff.

Directly after the transfer to the plaintiff by the said associates as hereinbefore described, of the rights under the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, the plaintiff sold, by written contract of sale, to the Vulcan Steel
6 Products Company, a corporation with its principal offices in the City of New York, State of New York, all of the Eighteen

Thousand (18,000) tons of steel ship plate purchased by the plaintiff under the terms of the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, from the said Allegheny Steel Company. A true copy of said contract of sale between the plaintiff and the said Vulcan Steel Products Company is set forth in Exhibit VII, which is hereto attached and made a part hereof as completely as tho set out in full at this point. By the terms of this contract the said Vulcan Steel Products Company was obligated to post certain letters of credit. The Vulcan Steel Products Company met this obligation and such letters of credit in excess of Two Million, Three Hundred Thousand Dollars ($2,300,000) actually were satisfactorily posted by the said Vulcan Steel Products Company in due and proper season for the performance of the contract.

The plaintiff further alleges for its cause of action that while it was fully possessed of all the right, title and property hereinbefore described, vested in it by reason of its contract, set out in Exhibit VI, hereto attached and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, by which the said Allegheny Steel Company was obligated to manufacture and deliver to the plaintiff Eighteen Thousand (18,000) tons of steel plate in equal monthly installments during the year of 1918, that the defendants, through one of their agents for the purpose, i. e., one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government, well knowing and admitting the right, title and property of the plaintiff in its contract, herein set out in Exhibit VI, attached hereto and made a part hereof with the said Allegheny Steel Company and before any deliveries had been made under said contract, in the month of September, 1917, notified the said Allegheny Steel Company that they, the defendants, required for public use the steel plate production capacity of the said Allegheny Steel Company for the year 1918 and demanded that the Allegheny Steel Company refuse to comply with its contract (Exhibit VI) with the plaintiff; and that no offer of compensation was made by the defendants to the plaintiff for this taking of its private property for the public use.

The plaintiff further alleges for its cause of action; that in the month of October, 1917, the defendants by one of their agents for the purpose, one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government, well knowing and admitting the right, title and property of the plaintiff in its contract, herein set out in Exhibit VI, attached hereto and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, and before any deliveries had been made under said contract commanded the said Allegheny Steel Company to cease all preparation for the performance of its contract with the plaintiff; that the defendants by their said agent declared to the president of the said Allegheny Steel Company that if the said Allegheny Steel Company attempted to follow out its contract with the plaintiff that the defendants would confiscate the entire plant of the Allegheny Steel Company and would operate it for the public use; that the defendants ordered the said Allegheny Steel Company

to fill only such orders as would be given it by the defendants and to hold its plant production capacity for the year 1918 at the complete and absolute disposal of the defendants; that the defendants thereby took for the public use the raw materials in the possession of the said Allegheny Steel Company, which materials were purchased by means of the letters of credit posted by the plain-
8 tiff under the terms of its contract aforesaid (Exhibit VI) with the said Allegheny Steel Company and were purchased solely for the performance of said contract; that the defendants by such orders and commands rendered unlawful and impossible the performance of the contract of the said Allegheny Steel Company with the plaintiff; that the defendants by such orders and acts took for the public use the right of priority in the plaintiff to the steel plate expected to be produced by the Allegheny Steel Company in the year 1918; that the defendants by such orders and acts took for public use the property of the plaintiff in its contract (Exhibit VI) with the said Allegheny Steel Company and, tho often requested, have made no compensation to this plaintiff for so doing, as the defendants lawfully must under the provisions of Article Five of the Constitution of the United States providing: "nor shall private property be taken for public use, without just compensation."

The plaintiff further alleges for its cause of action: that the defendants, tho well knowing and admitting the right, title and property of the plaintiff in its contract aforesaid, herein set out as Exhibit VI, hereto attached and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, throughout the year 1918, up to and including the eleventh day of November of that year and sometime thereafter, continued to refuse to permit the said Allegheny Steel Company to fulfill its contract aforesaid with the plaintiff; that the defendants continued, for the period last named, thus to take for public use the private right of the plaintiff to priority in the 1918 production of steel ship plate by the said Allegheny Steel Company; that the defendants continued, for the period last named, to employ for public use, in the manufacture by the said Allegheny Steel Company of the steel ship plate, the raw materials purchased by the said Allegheny Steel Company
9 by means of the letters of credit posted by the plaintiff in favor of the Allegheny Steel Company under the terms of the contract aforesaid (Exhibit VI); that the defendants, for the period last named, took for public use as it was produced, the very ship plate which belonged to the plaintiff under its contract last aforesaid (Exhibit VI); that the defendants took the aforesaid property of the plaintiff for the actual substantial benefit of the public; that, though often requested so to do, the defendants have totally refused to pay to the plaintiff just compensation for this taking of private property for public use as they lawfully must under the provisions of *the* Article V of the Constitution of the United States hereinbefore quoted.

The plaintiff further alleges: that submitting to the lawful demands of its sovereign government, it made every possible effort

known to it to avoid the calamitous result to it of the action of the defendants and that every step was taken and every channel conceivable explored in an effort to mitigate the injuries resulting from the orders and acts of the defendants set forth in the three paragraphs next preceding; that all such effort proved of no avail and that the total loss incurred by the plaintiff as a direct result of the acts of the defendants, described in the three paragraphs next preceding, was the sum of Nine Hundred and Ninety Thousand Dollars ($990,000), which is the consideration paid to the Allegheny Steel Company aforesaid by the transfer of machinery and equipment to that company, as hereinbefore described, for the contract right given the plaintiff under the terms of the contract set out in Exhibit VI, hereto attached and made a part hereof. This amount and no less, after allowing for just credits and offsets to the defendants, is due and unpaid.

The plaintiff further alleges that it presented its claim under the provisions of Section 1 of the Act of March 2, 1919, 40
10 Stat. 1273, to the Secretary of War in the manner prescribed by that officer in rules and regulations issued by him and that said officer has refused to afford the plaintiff any relief in the premises; that the plaintiff is the sole owner of the claim herein presented; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that the claimant has always borne true allegiance to the government of the United States.

Wherefore the plaintiff prays judgment against the defendants in the sum of Nine Hundred and Ninety Thousand Dollars ($990,000).

JACOB MEURER,
Secretary Omnia Commercial Company, Incorporated, Plaintiff.

GEORGE M. MORRIS,
Attorney for the Plaintiff.

11 *Verification.*

STATE OF NEW YORK,
County of Kings, ss:

Jacob Meurer, being duly sworn deposes and says; that he is the subscriber above; that he is the secretary of the plaintiff corporation in the above entitled cause with full power to sign the foregoing petition on behalf of said corporation; that he has read carefully the foregoing petition, knows the contents thereof and that he sincerely believes every statement made therein to be wholly true.

JACOB MEURER.

Subscribed and sworn to before me this 1st day of April, 1921.
April, 1921.

N. H. GLODE,
Notary Public.

Bronx Co. No. 52, Reg. No. 11. New York Co. No. 113, Reg. No. 3125. Kings Co. No. 10, Reg. No. 3073. Queens Co. No. 189. Certificate filed in Richmond and Westchester Cos.

12 EXHIBIT I.

Allegheny Steel Company,
Olive Building,
Pittsburgh, Pa.

May 14, 1917.

Mr. Charles Dannen,
Hotel Biltmore,
New York, N. Y.

DEAR SIR:

We hereby confirm conversation between yourself, Mr. R. P. Tucker and writer, in which we quoted you, for 1,500 tons per month of Basic Open Hearth Sheared Steel Ship Plates to Lloyd's specifications, and for delivery in approximately equal monthly quantities during the year 1918, a price of $6.25 per 100# F. O. B. cars our Mill at Brackenridge, Pa.

In submitting the above proposition it is understood that you will specify sizes satisfactory to us and in any event not to exceed 90" wide, lengths within the range shown on the table attached hereto.

Price is based on furnishing rectangular plates only; sketch items must not, in any event, exceed 10% to be submitted to us for consideration.

All agreements contingent upon strikes, accidents, or other causes beyond our control. On unsatisfactory material our liability is limited to value of material or replacement of same. No allowances for labor. Quotations subject to approval by our credit department. Quotations subject to change without notice.

Assuming that this material is intended for export, it is understood that our terms require that when order is placed with us you will establish, in a New York or Pittsburgh Bank satisfactory to us, an irrevocable credit covering full value of the tonnage involved, payments to be made upon presentation of our invoices, to which will be attached sight draft and inland bill-of-lading; ½ of 1% discount to be allowed from face of invoice for said cash payment.

If material is not intended for export, terms satisfactory to our Credit Department to be arranged.

It is understood that the above quotation is made for acceptance not later than Tuesday, May 22nd.

Yours very truly,

ALLEGHENY STEEL COMPANY,

(Sig.) HARRY E. SHELDON,
President.

H. E. S.: J.

13 EXHIBIT II.

Postal Telegraph—Commercial Cables.

Telegram.

May 17, 1917.

Allegheny Steel Co.,
c/o Harry E. Sheldon, President,
Oliver Building,
Pittsburgh, Pa.:

We hereby accept your proposition as contained in your letter of May fourteen, Nineteen Hundred and Seventeen.

(Sig.) CHARLES DANNEN.
(" ") R P TUCKER

Prepaid.
Charge Room 1531.

EXHIBIT III.

May 17, 1917.

Allegheny Steel Co.,
c/o Harry E. Sheldon, President,
Oliver Building,
Pittsburgh, Pa.

DEAR SIRS:

We have just wired you as follows:

"We hereby accept your proposition as contained in your letter of May fourteen, Nineteen Hundred and Seventeen."

which wire we beg hereby to confirm.

Yours very truly,

(Sig.) CHARLES DANNEN,
" R. P. TUCKER.

14 EXHIBIT IV.

Contract made this fifteenth day of June, A. D., 1917, by and between Harry E. Sheldon and Robert D. Campbell, of the City of Pittsburgh, Allegheny County, Pennsylvania, hereinafter designated "Vendors", parties of the first part, and Charles B. Eddy, Jacob Meurer, Charles Dannen and R. P. Tucker, all at the date hereof residing in New York City, New York, hereinafter designated "Purchasers", parties of the second part.

Witnesseth:—that said Vendors and Purchasers covenant and agree to and with each other, each jointly and severally binding themselves, their respective heirs, executors and administrators, as follows, to-wit:—

First. That there has been executed on the date above written a contract wherein the Purchasers herein, except Jacob Meurer, are designated the Vendors, and the Vendors herein are therein desig-

nated the Purchasers, providing for the sale and delivery to the Vendors herein of certain personal property, to-wit, a 34-inch blooming mill and equipment, etc., etc.; a direct current 6,000 H. P. reversible motor and other electrical apparatus constituting an electrical plant for the operation of said blooming mill, etc., etc.; and some 1,363 tons of structural steel, together with the transfer of some eight contracts to which the Chattanooga Steel Company of Chattanooga, Tennessee, is a party, and that the vesting of the title to said property and contracts, together with the exclusive and undisputed possession thereof in the Vendors herein is necessary and essential to enable the vendors to manufacture and deliver the ship plates and tank plates hereinafter specified.

Second. That said contract mentioned in Section First hereof is expressly made part of this agreement, with the same effect as if set forth herein at length, and that unless the title and possession to the personal property therein mentioned is absolutely vested in the Vendors herein on or before July 15th, 1917, this contract shall at the option of the Vendors herein be null and void, and shall become null and void upon said Vendors mailing to R. P. Tucker, one of the Vendors notice declaring this contract to be null and void, addressed to him at Hotel Vanderbilt, New York City, New York, and after the mailing of said notice, nothing herein contained shall be binding and effective upon and against said Vendors.

Third. Subject to the conditions expressed in Sections First and Second hereof and upon the terms and conditions and for the considerations hereinafter set forth, the Vendors will deliver to the Purchasers or their order, during the year 1918, in approximately equal monthly installments, 25,000 tons of ship plates according to Lloyds specifications and subject to Lloyds' inspection but within the schedule of sizes and restrictions enumerated in Exhibit "A" attached hereto and made part hereof, at the price of seven and three-quarter cents (7¾c) per pound delivered f. o. b. cars Pittsburgh rate district, and also 15,000 tons of ordinary commercial tank plates within the same sizes specified in said Exhibit "A" for ship plates at six and three-quarter cents (6¾c) per pound delivered f. o. b. cars Pittsburgh rate district; the considerations for all of said plates, both ship and tank, to be protected and paid for in manner following, to-wit:

(*a*) On or before December 15th, 1917, the Purchasers will establish in a financial institution satisfactory to the Vendors herein an irrevocable credit of at least One Million ($1,000,000.00) Dollars which shall continue in force and effect until all of the plates, ship and tank, contemplated to be manufactured and delivered hereunder shall be manufactured and delivered said credit to be applicable to the payment of the last shipments of said plates upon the same terms and conditions as are herein set forth with relation to the monthly payments for monthly deliveries of said plates.

(*b*) On or before the fifth day of each month of the year 1918, the Vendors shall notify said financial institution of the probable

tonnages of both classes of plates to be delivered under the
16 provisions hereof during the then current month and thereupon on or before the twentieth of each month of said year the Purchasers shall establish at said financial institution sufficient irrevocable credits in addition to said One Million ($1,000,000.00) Dollar credit above mentioned to meet and pay for the tonnages delivered in each of said months in accordance with the notice above specified.

(c) All of said irrevocable credits shall be established at said financial institution from time to time as above provided with the irrevocable authority and power in said institution acting through its proper officer or officers to pay to the Vendors herein the prices herein provided to be paid for said plates upon presentation of invoices for said plate tonnages accompanied by bills of lading consigning said plates to the Purchasers at New York City, New York, or such other points as said Purchasers may direct and notify said institution and the Vendors herein in writing from time to time, railroad weights to control and fix the amounts of said payments.

Fourth. It is mutually understood and agreed that in the event that the Purchasers fail at any and all times to maintain and procure to be established the irrevocable credits and to cause the same to be disbursed in the manner specified in sub-paragraph (a), (b) and (c) of Section Third hereof, the Vendors shall have the following options: (a) to cancel this contract in its entirety, or any unperformed part thereof absolutely; (b) to postpone delivery of said plates until said credits are established, maintained and provided to their satisfaction; and (c) to deliver all plates manufactured up to the time of default by the Purchasers with relation to said irrevocable credits.

Said financial institution shall be bound to certify to the Vendors upon their requests the amounts of said irrevocable credits established and maintained with it by the Purchasers from time to time available for the purposes of this contract.

Before exercising said options (a), (b) and (c) mentioned in this
17 paragraph, the Vendors shall give the Purchasers ten (10) days' written notice of their intention so to do, which notice shall be deposited with the institution in which said irrevocable credits are established and maintained, which notice when so written shall be binding and effective upon the Purchasers herein; if the Purchasers within the term of said ten (10) days' notice shall restore said One Million ($1,000,000.00) Dollar credit and establish the additional irrevocable credit to provide for the monthly shipment notified as above provided, and said institution shall notify the Vendors thereof according to the fact by written notice addressed to the Vendors at 2332 Oliver Building, Pittsburgh, Pennsylvania, said vendors shall not at the time have the right to exercise said options, otherwise the right to exercise said options shall be absolute in said Vendors.

Fifth. It is further mutually understood and agreed that any written instrument necessary to be signed, sealed and delivered in

connection with the carrying out of the provisions hereof, signed, sealed and delivered by either of the Vendors shall be binding and effective upon both of said Vendors, and that any such instrument signed, sealed and delivered by said R. P. Tucker, one of the Purchasers, on behalf of himself and his associates, the Purchasers herein, shall be binding and effective upon all of said Purchasers.

Sixth. It is further mutually understood and agreed that these presents constitute the entire contract between the parties hereto with reference to the several subject matters hereof, and that this contract shall not be amended, modified or altered, except by written instrument executed by or on behalf of the parties hereto, and that no oral amendment, alteration or modification hereof shall be binding and effective upon any of the parties hereto unless reduced to writing and expressly made part hereof.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

HARRY E. SHELDON, [SEAL.]
ROBERT D. CAMPBELL, [SEAL.]
Vendors.
R. P. TUCKER, [SEAL.]
CHARLES B. EDDY, [SEAL.]
CHARLES DANNEN, [SEAL.]
JACOB MEURER, [SEAL.]

18 EXHIBIT "A."

Attached to and forming part of the contract dated June 15th, 1917, between Harry E. Sheldon and Robert D. Campbell, of Pittsburgh, Pennsylvania, and Charles D. Eddy, Jacob Meurer, Charles Dannen and R. P. Tucker.

Specifications Sizes, Shapes and Quantities.

It is agreed that the second parties will specify satisfactory quantities of sizes satisfactory to the first parties and in any event not to exceed 108 inches wide and all lengths within the range shown on the following table:

Thickness in inches.	Weight per sq. ft.	Widths "—inches								
		30 to 40	41 to 48	49 to 54	55 to 60	61 to 72	73 to 84	85 to 96	97 to 100	101 to 108
1/4	10.2	360	240	0	360	432	360	240	0	0
5/16 ...	12.75	360	360	0	360	432	432	360	0	0
3/8	15.30	360	400	360	432	180	180	400	400	360
1/2	20.40	360	400	400	432	180	180	180	180	400
3/4	30.60	0	0	0	300	360	360	336	300	300
1"	40.80	0	0	0	300	300	275	250	250	0
1 1/4	51.00	0	0	0	260	260	220	180	180	0

Specifications shall cover rectangular plates principally, but sketch items satisfactory to the first parties only will be accepted, but will not be accepted in any event in excess of 10% of any monthly quota.

Restrictions and Conditions.

The first parties shall not be liable for any delays, losses or damages caused by fire, differences between employes and employers, executing the contract of which this is an exhibit, accidents, government seizures or stoppages or contingencies beyond the control of the first parties. Any of such causes shall be sufficient reason for any delays in the performance of the provisions of said contract caused thereby.

Approved ——— —, 1917.
(Sig.)

HARRY E. SHELDON,
For Himself and Associates.
R. P. TUCKER.
For Himself and Associates.

19 EXHIBIT V.

Contract Made this Fifteenth day of June, A. D., 1917, by and between Charles B. Eddy, R. R. Watney, Charles Dannen and R. P. Tucker, all at the date hereof residing in New York City, New York, hereinafter designated "Vendors," parties of the first part, and Harry E. Sheldon and Robert D. Campbell, of the City of Pittsburgh Allegheny County, Pennsylvania, hereinafter designated "Purchasers," parties of the second part.

Witnesseth:—that said Vendors and Purchasers covenant and agree to and with each other, each jointly and severally binding their respective heirs, executors and administrators, as follows, to wit:—

First. The Vendors will sell, assign, transfer and deliver at the points hereinafter specified to said Purchasers or their written order upon the terms and conditions herein contained, the following property, to-wit:

(*a*) One 34-inch blooming mill with all the equipment in connection therewith or pertaining thereto, more particularly enumerated and described in a contract between the National Roll & Foundry Company of Avonmore, Pennsylvania, and Chattanooga Steel Company of Chattanooga, Tennessee, dated March 7th, 1916, to be delivered at the works of said National Roll & Foundry Company at Avonmore, Pa., in accordance with the terms of said contract, free and clear of all claims and encumbrances of whatsoever nature by the manufacturer thereof or any other person, firm or corporation whatsoever, consigned to said Purchasers at such point as they may in writing designate, the Purchasers to pay the freight between Avonmore and said designated point of destination.

(*b*) One direct current 6,000 H. P. reversible motor and other equipment and appurtenances constituting the electrical plant described and specified in the contract and specifications thereto
20 between the Westinghouse Electric & Manufacturing Company of East Pittsburgh, Pa., and Chattanooga Steel Company of Chattanooga, Tennessee, dated August 30th, 1916, to be delivered on board cars at Chattanooga, Tennessee, free and clear of all claims and encumbrances of whatsoever nature by the manufacturer thereof or any other person, firm or corporation whatsoever, consigned to said Purchasers at such point as they may in writing designate, the Purchasers to pay the freight between Chattanooga and said designated point of destination, and all reasonable loading charges thereon.

(*c*) Approximately 1363 tons of structural steel generally in accordance with schedule hereto attached and marked Exhibit "A" and made part hereof, to be delivered on board cars at Chattanooga, Tennessee, free and clear of all claims and encumbrances of whatsoever nature by any person, firm or corporation whatsoever, consigned to said Purchasers as they may in writing designate, the Purchasers to pay the freight between Chattanooga and said designated point of destination, and all reasonable loading charges thereon.

(*d*) Written transfers in form satisfactory to counsel for Purchasers of all the right, title, interest, claim and demand of, in and to the contracts specified in this paragraph (*d*) of all parties other than the original sellers in said contract, which said contracts are as follows, and which are hereby expressly made a part hereof with the same force and effect as if herein at length set forth, said Vendors herein to deliver true and correct copies thereof to said Purchasers to-wit:—

1. Four certain contracts between the Chattanooga Steel Company of Chattanooga, Tennessee, and Walsh & Weidner Boiler Company of Chattanooga, Tennessee.

2. Any contracts which may now exist between the Harbison-Walker Refractories Company of Pittsburgh, Pa., and Chattanooga Steel Company of Chattanooga, Tennessee.

3. Two certain contracts now existing between the General Electric Company of Schenectady, New York, and the Chat-
21 tanooga Steel Company of Chattanooga, Tennessee.

Second. Upon the delivery by the Vendors to the Purchasers or their duly authorized representatives that property specified in sub-paragraphs (*a*), (*b*) and (*c*) and the transfers of contracts specified in sub-paragraph (*d*) of Section First hereof, accompanied by the written consent of the Chattanooga Steel Company, acting through C. E. James, of Chattanooga, Tennessee, or other duly authorized officer of said company, and the individual written assent of said C. E. James to the delivery of said property and contracts transferred as aforesaid, together with a certified copy of the authority from said Steel Company to said James to consent thereto on its behalf, the Purchasers will pay to the Vendors the sum of **Five**

Hundred Thousand ($500,000.00) Dollars, in manner following, to-wit:

(*a*) On or before June 18th, 1917, the sum of One Hundred and Fifty thousand ($150,000.00) Dollars.

(*b*) On August 1st, 1917, the sum of One Hundred Thousand ($100,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

(*c*) On September 1st, 1917, the sum of One Hundred Thousand ($100,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

(*d*) On November 1st, 1917, the sum of One Hundred and Fifty Thousand ($150,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

Third. It is mutually understood and agreed that the undertaking of the Vendors to sell and deliver the property specified in sub-paragraphs (*a*), (*b*) and (*c*) of Section First hereof is the essential and moving consideration to the Purchasers to make this contract, and a failure on the part of the Vendors to make delivery of the property specified in any one of said sub-paragraphs shall give the Purchasers the option to the right as they in their absolute judgment and discretion may determine, to accept delivery and pay for such of said property as shall have been delivered at any
22 time within thirty days after date hereof at a price which will not be greater than that part of Five Hundred Thousand ($500,000.00) Dollars which the contract price of the property delivered bears proportion to the aggregate of the contract prices of said property described in said sub-paragraphs (*a*), (*b*) and (*c*), and to refuse to accept further deliveries of said property.

Fourth. It is further understood and agreed that any written instrument necessary to be made and delivered in connection with the carrying out of the provisions hereof, signed and sealed by said R. P. Tucker on behalf of himself and his associates, the Vendors herein, shall be binding and effective upon all of said Vendors, either of said Purchasers may sign and seal such written instruments and bind both of said Purchasers with like effect as in the case of said Vendors.

Fifth. It is further mutually understood and agreed that these presents constitute the entire contract between the parties hereto with reference to the several subject matters hereof, and that this contract shall not be amended, modified or altered, except by written instrument executed by or on behalf of the parties hereto; and that no oral amendment, alteration or modification hereof shall be binding and effective upon any of the parties hereto unless reduced to writing and expressly made part hereof.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

R. P. TUCKER. [SEAL.]
CHARLES B. EDDY. [SEAL.]
CHARLES DANNEN. [SEAL.]
(RALPH R. WATNEY,) [SEAL.]
R. R. WATNEY.
Vendors.
HARRY E. SHELDON. [SEAL.]
ROBERT D. CAMPBELL. [SEAL.]
Purchasers.

This contract was carried out by the parties hereto.
Signed) R. P. TUCKER.

23 EXHIBIT A 1.

Duplicate of Original.

Agreement of sale, made this 23rd day of August, 1917, by and between Allegheny Steel Company of the City of Pittsburgh, State of Pennsylvania, hereinafter called the Seller, and Omnia Commercial Company, Inc., of 55 Liberty St., City and State of New York, hereinafter called the Buyer, witnesseth:

1. That the Seller hereby sells and the Buyer hereby buys material hereinafter described, subject to the conditions hereinafter expressed.

Quantity.

2. The quantity covered by this contract is eighteen thousand (18,000) net tons of two thousand (2,000) pounds each, basic open hearth steel ship plate, subject to Lloyd's specifications and to Lloyd's inspection at Buyer's expense, (See Lloyds Registered Rules for the Inspection of Steel Vessels 1915 16 edition.) It is agreed that Lloyd's inspection and acceptance constitute a final acceptance for the buyer's account; and the certificate of acceptance of Lloyd's inspectors shall constitute the sole and unimpeachable evidence that said plates meet the requirements of this contract.

Price.

3. The price shall be Six Dollars and Fifty Cents ($6.50) per one hundred pounds base for one quarter inch (¼") and heavier rectangles, and subject to the Seller's regular plate mill sales extras.

Deliveries.

4. Steel plates to be shipped in car load lots f. o. b. Seller's mill, to which it is understood the Pittsburgh rates of freight apply for points outside of Pittsburgh District to be consigned to the Buyer or as it

may direct; to be delivered during the year 1918 in approximately equal monthly quantities.

Specifications.

24 5. Specifications to be given for delivery during the year 1918, to be of gauges and sizes within the Seller's capacity with the customary allowance for variation in weights, sizes and lengths. Specifications in detail shall be given by the Buyer to the Seller before October 15, 1917, covering approximately Fifty Per cent (50%) of the plate to be shipped hereunder, and specifications in detail shall be given by the Buyer to the Seller before April 1st, 1918, covering approximately an additional Twenty-Five Per cent (25%) of the plate to be shipped hereunder, and specifications in detail shall be given by the Buyer to the Seller before July 1st, 1918, covering the remaining Twenty-Five per cent (25%) same being the entire balance of the plate to be shipped hereunder, each month's quota to constitute a separate and independent obligation on the part of the Buyer, except as otherwise agreed herein. Such portion of any monthly tonnage which may be specified and not produced at the end of each month it is understood that the Seller will produce as soon after that date as its mill conditions will permit. It is agreed that the Buyer will specify quantities and sizes satisfactory to the Seller and, in any event, not to exceed 90" wide and of lengths within the range shown on the table attached hereto and made a part hereof. It is understood that this contract is for rectangular plates principally, and that other shapes of plate must not in any event exceed ten per cent (10%) of any monthly quota, same to be submitted for the Seller's consideration.

Conditions.

6. The Seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures, embargoes (railroad or otherwise) or stoppages or contingencies beyond its control and any of such causes shall be sufficient reason or excuse for any delay caused thereby. In the event of any change in specifications of orders, entered, the full contract price will be paid on any tonnage then in course of manufacture. This is an 25 irrevocable sale and is not subject to cancellation, suspension of shipment or any change in prices, except as provided herein.

Special Agreement.

7. The Buyer's failure to furnish specifications as to any particular month's tonnage as herein provided, at the Seller's option shall be deemed a refusal to accept such tonnage, and in that event promptly thereafter the Seller may give written notice by mail to the Buyer of its intention to resell, and after the lapse of ten days from the mailing of said written notice the Seller shall have the right to sell the said tonnage on the open market at a time convenient to

the Seller for the Buyer's account, and to collect from the Buyer, the difference between the price at which the said tonnage is so sold and the price at which the Buyer has agreed to purchase provided it is sold for less than the price specified in this contract; that is to say, if the tonnage is sold at a rate of five cents per lb., the seller would collect from the Buyer the difference between five cents per lb. and six and one-half cents per lb., the price at which the Seller is selling to the Buyer. After such sale has been made for the Buyer's account, as above specified, the Seller shall notify the Buyer in writing of the price obtained by it and such notice shall fix the price without recourse or any right to object thereto on the part of the Buyer. Any such tonnage so sold shall be deducted from the undelivered tonnage of the contract.

Terms of Payment

8. Payment shall be net cash on presentation to bank specified herein of railroad bills of lading with invoices attached. The buyer shall establish in favor of the Seller on or before Sept. 1st, in a financial institution of New York City satisfactory to the Seller, irrevocable credits for at least $1,000,000, and thereafter shall maintain credits to the amount of not less than $1,000,000 until February 15, 1919, except that when the payments for the tonnage yet to be delivered hereunder are equivalent to $1,000,000, the payments thereafter shall be made from the $1,000,000 of credits then in effect.

On or before the 5th day of the month preceding each
26 monthly shipment, the Seller shall notify the said Buyer of the probable value of plates to be delivered under this contract during the succeeding month and thereupon on or before the 20th day of the month in which said notice is given the Buyer shall establish at said Financial Institution sufficient irrevocable credit in addition to said $1,000,000 credit above mentioned to meet and pay for the tonnage to be delivered during such month in accordance with the notice given as specified above.

All of said irrevocable credits shall be established at said Financial Institution from time to time as above provided, with the irrevocable direction, authority and power to said Financial Institution to pay to the Seller herein the payments provided for in this contract to be made upon presentation of invoices and bills of lading, as provided herein.

9. It is mutually understood and agreed that in event the Buyer fails at any and all times to maintain and establish the irrevocable credits and to cause the same to be disbursed and paid to the Seller in the manner specified, the Seller will have the right to cancel any unperformed part of this contract, but before exercising this right the Seller shall give the Buyer twenty (20) days' written notice of its intention so to do, a copy of which notice shall be mailed to said Financial Institution, in which said irrevocable credits are established. If the Buyer within the term of said twenty (20) days shall establish all credits agreed to be established, and pay all amounts due

hereunder up to that particular date and said Financial Institution shall so notify the Seller, addressing such notice to the Seller at Oliver Building, Pittsburgh, Pa., the Seller shall not for that particular offense have the right to exercise said option to cancel this said contract, otherwise the right to exercise the said option shall be absolute in the said Seller.

10. It is expressly agreed and understood between the parties hereto that the foregoing agreement comprises the entire agreement between the parties, and that there are no covenants, conditions or understandings independent of or collateral hereto, except the letter of credit hereinabove provided for.

27 In witness whereof, the parties hereto have caused these presents to be signed by their proper officers and their seals affixed.

This 17th day of Sept., A. D. 1917.

ALLEGHENY STEEL COMPANY.

(Sig.) By HARRY E. SHELDON,
President.

Attest:

(Sig.) R. D. CAMPBELL,
Treasurer.

OMNIA COMMERCIAL COMPANY, INC.,

(Sig.) By R. P. TUCKER,
President.

Attest:

(Signed) JACOB MEURER,
Secretary.

28 EXHIBIT VII.

New York, N. Y., May 19, 1917.

Quantity.

Omnia Commercial Co., Inc., of 55 Liberty Street, New York City, State of New York, sells and Vulcan Steel Products Co. of 120 Broadway, New York City, State of New York, buys the material herein described, subject to the conditions herein expressed. Specifications to be given for delivery during 1918 to be of gauges and sizes within the Seller's capacity, with the customary allowance for variation in weights, sizes and lengths.

Description and Price.

18,000 tons Basic Open Hearth Steel Ship Plates to Lloyd's specifications and subject to Lloyd's inspection for Purchaser's account. $9.25 base per cwt. Usual extras.

Specification.

Specifications in detail shall be given by Buyer in approximately equal monthly quantities, at least ninety days prior to period in which required; each month's quota to constitute a separate and independent contract, except as agreed upon or noted below. On such portion of any monthly tonnage which may be specified and not shipped at the end of each month it is understood that Seller will make shipment as soon after that date as Producer's mill conditions will permit. Purchaser will specify sizes satisfactory to Seller, and in any event not to exceed ninety inches wide, and of lengths within the range shown on the table attached hereto and made a part hereof. Rectangular plates only and sketch items must not, in any event, exceed ten per cent to be submitted for the Producer's consideration

Deliveries.

Goods to be shipped in carload lots F. O. B. mill, freight equalized with Pittsburgh, consigned to Vulcan Steel Prod-
29 ucts Co. or as they may direct; to be delivered during 1918, in approximately equal monthly quantities.

29

Conditions.

The Seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures or stoppages (affecting either Seller or Producer) or contingencies beyond its control and any of such causes shall be sufficient reason for any delay caused thereby. No claims for errors or deficiencies will be allowed by Seller unless made by Buyer within thirty days after receipt of material. The Seller agrees to replace material found defective, when in hands of the Buyer, but will not allow or pay any claim for labor, damage or expenses resulting. In event of cancellation of orders entered, the full contract price will be paid on any portion then in course of manufacture. This in an irrevocable sale and is not subject to cancellation (except as provided below), suspension of shipment or to any change in prices.

Terms of Payment.

Net cash, on presentation of Railroad Bills of Lading with invoices attached.' On or before June 25, July 25, and August 25, 1917, respectively, the Buyer shall establish with Empire Trust Co. or some other banking institution satisfactory to the Seller, three irrevocable letters of credit, one of such letters to be established on or prior to each of said dates, each of said letters to be good for the entire term, and each to be good for one-third of the whole purchase price of this contract, whereunder such institution shall be authorized and directed to pay the Seller for all materials sold hereunder on presentation of Bills of Lading as aforesaid. The Purchaser is aware

of the fact that the Seller has in turn engaged with the Producer to supply irrevocable credits for the materials comprised hereunder, and that the Seller will depend upon the credits so to be arranged by the Purchaser as a basis of supplying its own credits to the Producer.

If Buyer fails to make any payment according to the terms of this contract, Seller shall be under no obligation to make further shipments and for said cause may at its election at any time cancel all or any part of Buyer's unfilled or uncompleted contracts with Seller.

Accepted:

OMNIA COMMERCIAL COMPANY, INC.,

(Signed) By CHAS. B. EDDY,
President

Attest:

(Signed) JACOB MEURER,
Secretary.

Accepted:

VULCAN STEEL PRODUCTS CO.,

(Signed) By O. KAFKA,
General Manager.

Attest:

(Signed) H. D. MILLS,
Treas.

Sizes—Sheared Plates.

May 1, 1917.

Thickness in inches.	Weight per sq. ft.	Widths—inches. 30 to 50	51 to 60	61 to 72	73 to 90
1/4	10.20	360	360	432	360
5/16	12.50	360	360	432	360
3/8	15.30	432	432	432	180
1/2	20.40	132	432	432	180
3/4	30.60	0	300	360	360
1	40.80	0	300	360	2,888
1 1/4	51.00	0	0	264	216

31 II. *Demurrer.*

Filed August 12, 1921.

Now comes the defendant by its Attorney General, and demurs to the petition in the above entitled cause, for the reason that it does not state a cause of action against the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN C. EWING,
Attorney.

III. *Argument and Submission of Demurrer.*

On October 24, 1921, the demurrer in this case was argued by Mr. John G. Ewing, for the defendant, and by Mr. George M. Morris, for the plaintiff.

32 IV. *Opinion of the Court by Hay, J., on Defendant's Demurrer.*

Entered Oct. 31, 1921.

HAY, *Judge,* delivered the opinion of the court:

This is a petition brought by the Omnia Commercial Company against the United States to recover the sum of $990,000. To this petition of the plaintiff the defendant has demurred.

The petition alleges that the plaintiff entered into an agreement in writing dated June 15, 1917, with the Allegheny Steel Company, by the terms of which the Allegheny Steel Company was to deliver to the plaintiff a certain number of tons of ship plates and tank plates during the year 1918, for which the plaintiff was to pay in property and money. The petition further alleges that the plaintiff, relying upon its contract with the Allegheny Steel Company, agreed to sell certain amounts of said plates to the Vulcan Steel Products Company so as to produce a profit to the plaintiff. The petition further alleges that the United States Government in the month of October, 1917, and before any deliveries had been made to the plaintiff by the Allegheny Steel Company, notified the Allegheny Steel Company that it required for public use the steel plate production capacity of the said Allegheny Steel Company for the year 1918, and demanded that the Allegheny Steel Company refuse to comply with its contract with the plaintiff; and that by reason of this action of the United States the Allegheny Steel Company was prevented from complying with its contract with the plaintiff, and did not comply with the same; and that the United States by such action took for public use the property of the plaintiff in its contract with the Allegheny Steel Company, and has made no compensation to the plaintiff, as the defendant must do under the provision of article 5 of the Constitution of the United States. The petition further alleges that the total loss to the plaintiff was the sum of $990,000, which is the consideration paid to the Allegheny Steel Company by the transfer of machinery and equipment to that company.

The plaintiff is proceeding against the United States to recover the value of property which it claims was taken by the United States from it for public use without just compensation. And it bases its claim upon the provision of Article Five of the Constitution. If the United States did take the property of the plaintiff for public
33 use the plaintiff is entitled to just compensation therefor. The question at once arises, What property of the plaintiff did the United States take? According to the allegations of the petition the United States took the property of the Allegheny Steel Corporation; they took from the plaintiff no tangible property. There was no

privity between the plaintiff and the United States. The plaintiff had a contract with the Allegheny Steel Company for the future delivery of its product to the plaintiff. The fact that the United States in the progress of its prosecution of the war in which it was then engaged took the products of the Allegheny Company, and thereby prevented its fulfilling its contract with the plaintiff, does not give the plaintiff any claim against the Government.

When the plaintiff entered into the contract with the Allegheny Steel Company it knew, or ought to have known, that the products of that company were liable to be taken by the United States. But be that as it may, there is no warrant for the assertion of a claim by the plaintiff against the United States in the allegations of its petition. The property claimed to be taken is a contract for the future delivery of materials to which the United States is not a party. Such a claim is intangible, illusive, without substance, and is not such property as is contemplated in Article Five of the Constitution.

The petition alleges that the plaintiff presented its claim to the Secretary of War under the provisions of section 1 of the act of March 2, 1919 (40 Stat. 1273), and that such claim was rejected by said official. There is no contract express, implied, or informal between the plaintiff and the United States; and that being so, the plaintiff is not entitled to recover under the provisions of the act aforesaid.

The demurrer of the defendant is sustained, and the petition of the plaintiff is dismissed.

Graham, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

34 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirty-first day of October, A. D., 1921, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By THE COURT.

VI. *Plaintiff's Application for and the Allowance of an Appeal.*

Omnia Commercial Company, Incorporated, plaintiff, by George Maurice Morris, its attorney, makes application to the honorable Court of Claims for an appeal from this court's decision in the above entitled case to the Supreme Court of the United States.

GEORGE MAURICE MORRIS,
Attorney for the Plaintiff.

Filed Nov. 26, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

Dec. 6, 1921.

35

Court of Claims.

No. 197-A.

OMNIA COMMERCIAL COMPANY, INC.,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the argument and submission on demurrer; of the opinion of the Court on demurrer by Hay, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventh day of December, A. D. 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,608. Court of Claims. Term No. 653. Omnia Commercial Company, Inc., appellant, vs. The United States. Filed December 19th, 1921. File No. 28,608.